THE

AMERICAN LAW REGISTER.

OCTOBER, 1888.

OGDEN *v.* SAUNDERS REVIEWED.

I.

"DUE PROCESS OF LAW."

THE only point necessarily decided in the great case of *Ogden* v. *Saunders*, 12 Wheaton, 213–369, was, that a debtor's discharge under the insolvent laws of one State, is not a valid defence to an action brought in the Federal Courts by a creditor who is a citizen of another State, and has not voluntarily made himself a party to the insolvency proceedings: *Clay* v. *Smith*, 3 Peters, 411; although the contract in suit was made and to be performed in the debtor's State after the insolvent laws were passed and while they were in force: *Baldwin* v. *Hale*, 1 Wall. 223; *Gilman* v. *Lockwood*, 4 Id. 409.

The chief object of this article is to state and briefly explain a principle which, it is believed, will reconcile the conflicting decisions of the Federal Courts on the one hand, and the State Courts on the other hand, respecting the rights of non-resident creditors; or, more accurately, to state a principle which seems to reconcile the *reasoning* of the State Courts with the *decisions* of the Federal Courts on this question, in which contrary decisions have been rendered.

An attempt will be made to show, in the light of subsequent and analogous decisions, that the true ground of the Federal decisions is, not that prior insolvent laws impair the obligation of contracts of non-resident creditors, but that such

laws as applied to such creditors are unconstitutional, because they deprive such persons of their property "without due process of law," in violation of the 14th Amendment to the National Constitution; namely, by judicial proceedings in a court of insolvency without legal notice of those proceedings. The decree of discharge is therefore void for want of jurisdiction, as against such creditors.

The reasoning of the State Courts in which decisions conflicting with those of the Federal Courts have been made, proceeds on the ground that prior State insolvent laws do not impair the obligation of contracts, if the contract was made and to be performed within the State where such laws exist at the time of the contract's making, although the creditor be a citizen of another State: *Scribner* v. *Fisher*, 2 Gray, 43; *Parkinson* v. *Scoville*, 19 Wend. 150.

It is believed that this reasoning is sound, but that the decisions are erroneous on the ground of due process of law.

Insolvency proceedings, like every other kind of judicial proceedings, require legal notice to be given to every party whose rights may be injuriously affected. But the laws of a State have no extra-territorial operation except by comity, and therefore a State cannot constitutionally and effectively send its process for imparting notice beyond its own limits, so as to compel a non-resident to appear in the insolvency proceedings, and to be bound by them.

This is substantially the reasoning of the Federal Supreme Court in *Baldwin* v. *Hale*, 1 Wall. 223, 233–234; and *Gilman* v. *Lockwood*, 4 Id. 409, 411, which were cases involving insolvent laws, but in which the ground of being contrary to due process of law was not expressly mentioned. In *Gilman* v. *Lockwood*, *supra*, Mr. Justice CLIFFORD, who delivered the unanimous opinion of the Court, used this language: "Insolvent laws of one State cannot discharge the contracts of citizens of other States; because such laws have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceedings, has no jurisdiction of the case (page 411), citing *Baldwin* v. *Hale*, *supra*, and *Baldwin* v. *Bank of Newbury*, 1 Wall. 334.

In *Baldwin* v. *Hale*, *supra*, the Court said, on page 233: "Insolvent systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence." Citing, *Nations* v. *Johnson*, 24 How. 203; *Boswell's Lessee* v. *Otis*, 9 Id. 350; *Oakley* v. *Aspinwall*, 4 Comst. 514. And on page 234, the Court also stated that "insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and of course there can be no legal default."

Again in the recent case of *Sloane* v. *Chiniquy*, U. S. Circ. Ct. Dist. Minn. July 3, 1884, 22 Fed. Rep. 213, 215, Mr. Justice MILLER used this language: "No State insolvent law, as has been repeatedly decided, can discharge or release the debtor from his obligation to pay, under that contract, where the creditor is a citizen of another State; because the law cannot operate upon a citizen not within its jurisdiction. The theory of that is, that the judgment of a Court discharging a debtor from his obligations is, as to the creditor residing in another State, an *ex parte* judgment; but if he comes within the State and submits himself to the jurisdiction of the Court, it has never been held that the contract may not be discharged."

An examination of these cases will show that these quotations embody the true ground of the decisions. They do not contain one word about impairing the obligation of contracts, and they all express the idea that the insolvent laws of one State are unconstitutional and void as against non-resident creditors, on the single ground that they purport to allow a valid judgment of discharge of contracts to be rendered against the claims of non-resident creditors, who have received no "legal notice" of the insolvency proceedings. Although the

insolvency court had jurisdiction of the general subject of insolvency and of the person of the debtor, yet as it had not jurisdiction of the person of the non-resident creditor, the discharge was not valid as against such creditor (*Pratt* v. *Chase*, 44 N. Y. 597, 599–600) because the debt follows the person of the creditor: *Bedell* v. *Scruton*, 54 Vt. 493, 494; *Newton* v. *Hagerman*, U. S. Circ. Ct. Dist. Nevada, Nov. 26, 1884, 22 Fed. Rep. 524, 527. (See, also, *State Tax on Foreign-Held Bonds*, 15 Wallace, 300, 320–326.)

This course of reasoning brings the principle underlying these insolvency cases of non-resident creditors directly within the principle of *Pennoyer* v. *Neff*, 95 U. S. 714; *Harkness* v. *Hyde*, 98 Id. 476; *St. Clair* v. *Cox*, 106 Id. 350; *Freeman* v. *Alderson*, 119 Id. 185. These were cases of State statutes purporting to allow valid judgments *in personam* to be rendered against non-residents by publication of notice, or some other mode of substituted service of process short of personal service within the State, or a voluntary general appearance in the action. It was held that such notice was not "legal notice," and that the statutes were unconstitutional, and the judgments rendered by the State Courts in accordance with them were void, on the sole ground that they were contrary to due process of law, and violated the 14th Amendment to the National Constitution, which ordains that no State shall "deprive any person of life, liberty, or property without due process of law. It would be but a repetition of the reasoning above employed, with respect to the insolvency cases, to state the reasoning of *Pennoyer* v. *Neff* and other cases, and but a single extract will be made.

In *Freeman* v. *Alderson*, 119 U. S. 185, 188, Mr. Justice FIELD, in delivering the unanimous opinion of the Court, said: "The laws of the State have no operation outside of its territory, except so far as may be allowed by comity; its tribunals cannot send their citations beyond its limits and require parties there domiciled to respond to proceedings against them, and publication of citation within the State cannot create any greater obligation upon them to appear." (See, also, *Pennoyer* v. *Neff*, 95 U. S. 714, 727.)

All these cases show clearly that the constitutional question

involved is one exclusively of legal notice of judicial proceedings, and if the non-resident have not legal notice of those proceedings he is not bound by them, because the State statute is contrary to "due process of law," and the judgment or decree rendered in accordance with the statute is void for want of jurisdiction, as an unconstitutional statute cannot confer jurisdiction upon the Court: *Ex parte Siebold*, 100 U. S. 371, 376, 377; *Ex parte Jackson*, 96 Id. 727; *Collector* v. *Day*, 11 Wall. 113.

This view is also supported by the qualification engrafted upon the doctrine itself, namely, that a non-resident creditor who voluntarily becomes a party to the insolvency proceedings, without objecting to the granting of the discharge, thereby waives his extra-territorial immunity, and cures the unconstitutionality of the insolvent laws, and is therefore bound by the discharge. This point was decided in *Clay* v. *Smith*, 3 Peters, 411, in *Journeay* v. *Gardner*, 11 Cush. (Mass.) 355, 357, and in *Blackman* v. *Green*, 24 Vt. 17, 21.

This qualification is precisely "on all fours" with the well-settled rule that a non-resident defendant in an ordinary action *in personam*, who has been served merely by publication according to the local statute, and who enters a voluntary general appearance without objecting to the want of "legal notice," thereby waives his extra-territorial immunity, and cures the unconstitutionality of the local statute, and is therefore bound by the judgment: *Pennoyer* v. *Neff*, 95 U. S. 714.

The analogy becomes still more apparent when we consider another aspect of the two cases. In the insolvency cases it seems to be settled that where the non-resident creditor appears in the insolvency proceedings and *objects* to the granting of the discharge, he does not thereby waive any of his rights and is not bound by the discharge: *Norton* v. *Cook*, 9 Conn. 314; *McCarty* v. *Gibson*, 5 Gratt. (Va.) 307; *Collins* v. *Rodolph*, 3 Green (Iowa), 299; *Phillips* v. *Allan*, 8 B. & C. 477.

So, in the case of an ordinary action *in personam* against a non-resident, served only by publication, if he enters a special appearance and objects to the illegality of notice, he does not thereby waive any of his rights, and is not bound by the

judgment, although he answers to the merits after his objection is overruled: *Harkness* v. *Hyde*, 98 U. S. 476; *Walling* v. *Beers*, 120 Mass. 548.

Both cases seem to stand upon the same ground, namely, that the State Courts have no jurisdiction over the persons of non-residents, and the State Legislatures cannot legitimately confer that jurisdiction. The debt follows the person of the creditor, and it can neither be taxed nor discharged by any State of which the creditor is a non-resident: *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 320–326; *Bedell* v. *Scruton*, 54 Vt. 493, 494; *Newton* v. *Hagermann*, U. S. Circ. Ct. Dist. Nevada, Nov. 26, 1884, 22 Fed. Rep. 525, 527; *Von Glahn* v. *Varrenne*, 1 Dillon, 515, 519.

If it be objected to this view that the Supreme Court did not place the decisions in the insolvency cases upon the ground of due process of law, the answer is that those cases were all decided before the 14th Amendment was adopted, and therefore the Court could not do so. That the Court would do so now seems to follow from the whole tenor of *Pennoyer* v. *Neff*, 95 U. S. 714, in which it took advantage of the first opportunity, after the adoption of the 14th Amendment, to declare that any attempt on the part of State Legislatures to encroach upon the rights of non-residents by judicial proceedings *in personam*, founded upon substituted service of process, was contrary to due process of law and unconstitutional.

Before the 14th Amendment, the question seems to have been one, not properly of constitutional law, but of private international law, of comity, as pointed out by the Supreme Judicial Court of Massachusetts in *Marsh* v. *Putnam*, 3 Gray, 551, 557, 562, and by other Courts (see, also, *D'Arcy* v. *Ketchum*, 11 How. 165; *May* v. *Breed*, 7 Cush. 15, 36; *Hall* v. *Lanning*, 91 U. S. 160, 168–169; *Canada So. Ry. Co.* v. *Gebhard*, 109 Id. 527); and, therefore, the decisions of the Federal Supreme Court were not conclusive upon the State Courts. Consequently a writ of error would not have lain from the Federal Supreme Court to a Court of the State granting the discharge before the 14th Amendment. It seems worthy of notice, as perhaps reconciling the apparently conflicting decisions of the Federal and State Courts

upon this much vexed question of insolvent law, that no case decided by the Federal Supreme Court was carried up from a State Court, in which State the discharge had been obtained.

In *Ogden* v. *Saunders*, 12 Wheat. 213; *Suydam* v. *Broadnax*, 14 Peters, 67; *Baldwin* v. *Hale*, 1 Wall. 223; *Baldwin* v. *Bank of Newbury*, Id. 234; *Gilman* v. *Lockwood*, 4 Id. 409, the actions were all carried up from the Federal Courts, and it seems that these decisions rest solely on principles of international law.

That the question before the 14th Amendment was one of international comity, seems to follow from the recent case of *Canada Southern Ry. Co.* v. *Gebhard*, 109 U. S. 527. In this case, it appeared that Gebhard was a citizen of New York and purchased certain bonds of the railway company, which was a corporation organized under the laws of Canada, and that subsequently the Parliament of Canada enacted a "scheme of arrangement," the effect of which was to postpone the time of payment of the coupons and to lessen the rate of interest. This scheme was assented to by a majority of the bondholders, but Gebhard did not assent to it, and brought his action to recover upon his bonds in the State Court of New York, from which the railway company removed it to the Circuit Court of the United States. The defence was this "scheme of arrangement;" but the Circuit Court decided in favor of Gebhard, on three grounds: (1) that this legislation of Canada impaired the obligation of contracts; (2) that it deprived the bondholder of his property without due process of law, and (3) that comity did not require the Courts of the United States to give effect to such unjust foreign legislation as against our own citizens: *Gebhard* v. *Canada Southern Ry. Co.*, U. S. Circ. Ct. S. Dist. N. Y. Jan. 24, 1880, 1 Fed. Rep. 387. On a writ of error, however, the National Supreme Court reversed this judgment of the Circuit Court, and held that the contract was not impaired, nor was Gebhard deprived of his property without due process of law by such legislation; and that "the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries:" per Mr. Chief Justice WAITE, page 539.

The Court, comparing such legislation with bankrupt laws, said: "The confirmation and legalization of a 'scheme of arrangement' under such circumstances, is no more than is done in bankruptcy, when a 'composition' agreement with the bankrupt debtor, if assented to by the required majority of creditors, is made binding on the non-assenting minority:" page 536.

It is obvious that this decision rests solely upon "the true spirit of international comity," and not upon any principle of constitutional law. The opinion seems to proceed upon the ground of a waiver of constitutional rights by a purchase of bonds of a foreign corporation. Thus the Court says: "Every person who deals with a foreign corporation, impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. * * * He is conclusively presumed to have contracted with a view to such laws of that government:" pp. 537–538. *Vallee* v. *Dumerque*, 4 Exch. 290; *Australasia Bk.* v. *Harding*, 9 C. B. 661; *Copin* v. *Adamson*, L. R. 9 Ex. 345.

II.

"OBLIGATION OF CONTRACTS."

That impairing the obligation of contracts is not the true ground of these decisions, is further evinced by the late case of *Hall* v. *Lanning*, 91 U. S. 160, in which the Court placed the decision squarely upon the principles of international law. "This Court decided, in *D'Arcy* v. *Ketchum*, 11 How. 165," said the Court in *Hall* v. *Lanning*, at page 169, "that, by *international law*, a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, if the defendant had not been served with process, or voluntarily made defence, because neither the legislative jurisdiction nor that of the courts of justice had binding force."

In the later case of *Pennoyer* v. *Neff*, 95 U. S. 714, the language and reasoning of the Court are still more explicit. On

page 722 the Court says: "The other principle of *public law* referred to, follows from the one already mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. * * * No tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions." And again on page 727: "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled, to leave its territory and respond to proceedings against them."

Even when the Federal Courts are held within the same State which rendered the judgment affecting the non-resident, they are not conclusively bound by the State judgment, because they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State Court only the same faith and credit which the Courts of another State are bound to give to them: Id. pp. 732–733. (See, also, *Elliott* v. *Piersol*, 1 Peters, 328, 340.) That is, the judgment may be shown by parol evidence to be void, on the ground that the Court had not jurisdiction of the cause, or of the *res*, or of the person of the defendant: *Pennoyer* v. *Neff*, 95 U. S. 714; *Thompson* v. *Whitman*, 18 Wall. 457. Even when the record shows that the Court had jurisdiction; as that service of process was made on the defendant, this may be contradicted by parol and the judgment invalidated, in the Courts of another State, or in the Federal Courts: *Knowles* v. *Gaslight Co.*, 19 Wall. 58; *Thompson* v. *Whitman*, 18 Id. 457; *Pennoyer* v. *Neff*, 95 U. S. 715; *D'Arcy* v. *Ketchum*, 11 How. 165; *Elliott* v. *Piersol*, 1 Peters, 328, 340; *Mackay* v. *Gordon*, 34 New Jersey, 286.

In *Thompson* v. *Whitman*, *supra*, this doctrine was for the first time applied to judgments *in rem*, and it was held unanimously, that the statement of sufficient facts in the record to confer jurisdiction upon the State Court, might be contradicted by parol, and the judgment thereby invalidated in a Federal Court. And in the later case of *Pennoyer* v. *Neff*, 95 U. S. 714, this doctrine was still further extended to judgments *quasi in rem*; that is, proceedings against the person in form, but in substance against property; as where property

is brought under the control of the Court by seizure or some equivalent act at the commencement of the proceedings, but where no service is made upon the defendant, nor a voluntary appearance entered by or for him.

In this case of *Pennoyer* v. *Neff*, the decision is placed upon the constitutional ground that a State statute, purporting to allow a valid judgment *in personam* to be rendered against a non-resident without personal or voluntary appearance, is unconstitutional and void since the 14th Amendment, because it is contrary to due process of law. And it was further held, that since the same Amendment, such a judgment was void, not merely voidable, and could be impeached collaterally, not only in the Courts of other States and in the Federal Courts, but also in the Courts of the same State, and was reviewable in the National Supreme Court. On pages 732–733 of the opinion of the Court, it clearly appears that this last result of making the State Courts' decision reviewable in the National Supreme Court, was first accomplished by the 14th Amendment, and was not possible before the adoption of that Amendment, because no Federal question was involved, and the National Court had no jurisdiction. In other words, by the provision, that "no State * * * shall deprive any person of life, liberty, or property without due process of law," this whole subject of State judgments affecting non-residents was changed from a mere question of international law or comity, to review which the National Court had no power, to a most important question of constitutional law, to review which that Court has now plenary power.

An analogous course of reasoning seems to lead to a like result respecting discharges in insolvency, as against non-resident creditors; namely, that before the 14th Amendment, a discharge in insolvency granted by a State Court, was, when pleaded in the Courts of other States, a mere question of international law or comity (*May* v. *Breed*, 7 Cush. 15; *D'Arcy* v. *Ketchum*, 11 How. 165) over which the National Court had no jurisdiction; but that, since the adoption of that Amendment, the question is changed into one of consti-

tutional law, over which the National Court has now full jurisdiction.

It is believed that there is only one case contrary to this view, that of *Shaw* v. *Robbins*, 12 Wheat. 369, note, which was evidently decided without much consideration. All the other cases upon this point in the National Court were carried up from the Federal Courts and not from the State Courts. *Shaw* v. *Robbins* seems to be overruled by *Canada So. Ry. Co.* v. *Gebhard*, 109 U. S. 527, in which the decision is placed exclusively upon the ground of international comity. If this case had been carried up from a State Court instead of from a Federal Court, the National Supreme Court would have had no jurisdiction. This last statement assumes that the decision of the State Court would have been the same as that of the Circuit Court, namely, in favor of the creditor's claim that the statute impaired the obligation of his contract and deprived him of his property without due process of law. Many Courts and judges have criticized adversely the doctrine of *Ogden* v. *Saunders*, that prospective State insolvent laws impair the obligation of posterior contracts made and to be performed within the State, when the creditor happens to be a citizen of another State, but do not impair the obligation of such contracts when the creditor happens to be a citizen of the same State. Some of these cases are *Cook* v. *Moffat*, 5 Howard, 309; *Marsh* v. *Putnam*, 3 Gray, 551; *Donnelly* v. *Corbett*, 3 Selden (N. Y.), 500, 505–506; *Felch* v. *Bugbee*, 48 Maine, 9, 17; *Towne* v. *Smith*, 1 Wood. & M. 115, 130–134.

The doctrine itself, when stated in this bald form, seems utterly contradictory if not absurd. It seems difficult, if not impossible, to understand how the mere fact of difference in citizenship can impair the obligation of contracts. In *Donnelly* v. *Corbett*, 3 Selden, 500, the Court repudiated the doctrine that prior State insolvent laws impair the obligation of contracts, which, by their terms, were to be performed within the State as against non-resident creditors; and placed the decision upon the ground that the laws of one State have no extra-territorial operation and could not legitimately operate injuriously upon the rights of citizens of other States.

In *Poe* v. *Duck*, 5 Md. 1, the Court put a similar decision

upon the ground of notice, stating that the insolvency courts of Maryland had no power to decide "upon the rights of persons without giving them a sufficient opportunity of being heard:" pp. 8-9.

If the non-resident creditor had written into the contract a clause or condition to the effect that the debt might be discharged at any time upon a full surrender and distribution of the debtor's present possessions, ratably among all the creditors, without a payment in full or any claim upon the debtor's future acquisitions of property, it seems perfectly clear that, if the debtor complied with these terms, the debt would be discharged without impairing the obligation of the contract. This clause or condition forms an essential part of the obligation of the contract and, therefore, cannot impair it.

The only remaining question is, therefore, whether or not a non-resident, who voluntarily makes a contract in the debtor's State to be performed therein, does not ratify and adopt and make a part of his contract the fair and ordinary insolvent laws of that State, just as much as if he had written them into the contract.

This is the very reason always assigned for the first branch of the rule in *Ogden* v. *Saunders* relating to contracts between citizens of the same State, and, on principle, it seems that the same reason should hold good for the second branch of that rule relating to contracts between citizens of different States, which are made and to be performed within the State granting the discharge.

As a general proposition it is settled conclusively that the laws subsisting in a State, when and where a contract is made and is to be performed, enter into and form a part of the obligation of the contract just as if they had been expressly referred to and incorporated in the contract by the parties. "This principle embraces alike those [laws] which affect its validity, construction, *discharge*, and enforcement:" per Mr. Justice SWAYNE in *Von Hoffman* v. *Quincy*, 4 Wall. 535, 550; citing *Green* v. *Biddle*, 8 Wheaton, 92; *McCracken* v. *Hayward*, 2 Howard, 612; *Bronson* v. *Kinzie*, 1 Id. 319; *People* v. *Bond*, 10 Cal. 570; *Ogden* v. *Saunders*, 12 Wheaton, 231. The two cases of *Bronson* v. *Kinzie*, 1 Howard, 311, and

Brine v. *Insurance Co.*, 96 U. S. 627, illustrate very clearly this general proposition. These cases both turned on the identical statute, that of Illinois, allowing to a mortgagor twelve months to redeem, after a sale under a decree of foreclosure, and to his judgment creditor three months after that period. The latter case arose on a contract made *after* the statute was passed; the former on a contract made *before* it was passed. It was held that in the latter case this law entered into and became a part of the contract, and, therefore, did not impair its obligation and was valid; while in the former case that the law did not enter into and become a part of the contract, and was, therefore, void, because it impaired the obligation of the contract.

This rule applies even to the State laws relating merely to the remedy as shown by the above cases. (See, also, *Edwards* v. *Kearzey*, 96 U. S. 595; *Seibert* v. *Lewis*, 122 Id. 284.) Now, does the fact that the creditor is a citizen of another State from that of the debtor, in which latter State the contract was made and to be performed, change or reverse the legal effect and meaning of the contract, or take the case out of the general rule?

In all, except insolvency cases, it seems to be settled that it does not. In addition to the authorities cited above, see *May* v. *Breed*, 7 Cush. 15, 33–41; *Mather* v. *Bush*, 16 Johns. 233; *Hicks* v. *Hotchkiss*, 7 Johns. Ch. 297, KENT, Chan.; *Very* v. *McHenry*, 16 Shep. (Me.) 206.

In *May* v. *Breed*, *supra*, the contract was made in England, while the English Bankruptcy Act was in force, and was also to be performed therein by its terms. The creditor was a citizen of Massachusetts, and the debtor was a citizen of England, and obtained his discharge under the English Act. It was held that said Act entered into and formed a part of such contract, and was by comity the law governing the contract, wheresoever suit was brought, and hence did not impair its obligation.

Every contract is necessarily governed by the laws of some State or country, and, in the language of Chief Justice MARSHALL, it is a "principle of universal law * * * that in every form, a contract is governed by the law with a view to which

it was made: *Wayman* v. *Southard*, 10 Wheat. 1, 48; *Lamar* v. *Micou*, 114 U. S. 218, 220.

In the absence of any thing in the contract to indicate by what law the parties intended the contract to be governed, the Court must determine from all the facts of the case "to what general law it is just to presume that they have submitted themselves in the matter:" per Mr. Justice WILLES in *Lloyd* v. *Guibert*, 6 B. & S. 100, 130; s. c. L. R. 12 B. 115, 120. A striking illustration of this rule is found in the case of *Watts* v. *Camors*, 115 U. S. 353, 362, where the Court says: "Americans and Englishmen entering into a charter party of an English ship for an ocean voyage, must be presumed to look to the general maritime law of the two countries, and not to the local law of the State in which the contract is signed." It was accordingly held that the contract was governed by the maritime law, which was different from that of Louisiana, where the contract was signed, although the suit was brought in the United States Circuit Court sitting in Louisiana. (See, also, *Pritchard* v. *Norton*, 106 U. S. 124; *The Gaetano*, 7 L. R. P. D. 137.)

From these cases, it appears that though neither the place of making nor the place of performance of a contract is conclusive in deciding what law is to govern the contract, yet that these are leading facts to be considered in connection with the other facts of the case, including the difference of citizenship. When the place of making is also the place of performance, the presumption is very strong that the parties contracted with a view to the law of that place and meant their contract to be governed by the law of that place, especially where the debtor is a citizen of that State or country, although the creditor is not.

It is evident that the same contract cannot be governed by two different sets of laws. When A. and B., citizens of different States, make a contract which contains no express language indicating that the parties intend their contract to be governed by the laws of some third State or country, the contract will be governed either by the laws of A.'s State or by the laws of B.'s State (*Paine* v. *R. R. Co.*, 118 U. S. 152, 161), because that is the most just and reasonable rule to

adopt; and it will not be governed by the laws of any other State or country, unless the place of performance is in such other State or country: *Watts* v. *Camors*, 115 U. S. 353, 362; *Pritchard* v. *Norton*, 106 Id. 124; *Boyle* v. *Zacharie*, 6 Peters, 635.

When the creditor voluntarily makes his contract in the debtor's State and expressly agrees to its performance there, is the contract to be governed by the laws of the creditor's State or by the laws of the debtor's State? It is simply a question of whether the creditor or the debtor shall be favored, as both cannot be, and which law the parties may justly be presumed to have had in view when they made the contract. Under all the circumstances of the case the debtor seems to have the stronger claims to favor, and the laws of his State relevant to contracts should be deemed the laws which the parties had in view. He has done no act tending to mislead the creditor, and he has the right to rely upon the protection afforded him by the laws of his State, and also, perhaps, the right to presume that the creditor knew the laws of his (the debtor's) State, at least upon such a well-known subject as ordinary insolvent laws: *May* v. *Breed*, 7 Cush. 15, 33–41; *Blanchard* v. *Russell*, 13 Miss. 1, 4.

CONCLUSION.—The views herein maintained seem to reconcile many, if not most, of the apparently conflicting decisions. They free the rule relating to posterior contracts made under State laws, from the anomalous qualification that, if the creditor be a non-resident, the State insolvent laws (and those only), do not enter into and form part of the contract, and do, therefore, impair the contract's obligation; while if the creditor be a resident or citizen of the debtor's State, they do enter into and form part of the contract, and therefore do not impair the contract's obligation.

It is believed that the true explanation of this anomalous qualification may be found in the recognition of the principle that it is contrary to natural justice to deprive a non-resident creditor of his property by insolvency proceedings without legal notice of those proceedings, and where, consequently, the insolvency court has no jurisdiction to discharge the debt,

as the debt attends the person of the creditor. The question having arisen prior to the adoption of the 14th Amendment, the Courts felt obliged to adopt this rule to protect the natural rights of non-residents from the encroachments of the several States. But the provision of the 14th Amendment, that no State shall deprive any person of property without due process of law, affords the Courts an intelligible and constitutional ground upon which to protect the rights of non-resident creditors within the principles of *Pennoyer* v. *Neff*, 95 U. S. 714.

CONRAD RENO.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Massachusetts.

BROWN v. CUNARD S. S. CO.

A bill of lading provided, that "in the event of loss or damage for which the ship is responsible, the liability shall not exceed the invoice, or the declared value for the United States customs duty." The goods were damaged to an amount less than the invoice value, but were worth, in their damaged condition, the invoice value, plus the cost of importation. *Held*, that the carrier was liable for the full actual damage.

AT the trial in the Superior Court, the amount of the damage, and the fault of the defendant which caused the damage, were found as stated in the opinion of the Supreme Court. The defendant, however, claimed that as the goods were still worth their invoice value, which was the limit of the defendant's liability, no damage had been shown for which it could be held responsible under the bill of lading, and the Superior Court ruled accordingly.

Frederic Dodge, for plaintiff.
George Putnam and *Thomas Russell*, for defendant.

HOLMES, J. The plaintiff's goods were damaged on the defendant's vessel, through its fault, to the amount of $151.78, in their market value in Boston, the port of destination, but it did not appear that their market value, as damaged, was less than the invoice value of the sound goods, with the cost of importation added. The bill of lading limits the defend-